

NO. 6037

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CLAUDE CARTER,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Arizona.

FILED

JAN 23 1930

PAUL P. O'BRIEN,
CLERK

NO. 6073

United States
Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

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ATTORNEYS OF RECORD.

JOHN C. GUNG'L, United States Attorney, Tucson,
Arizona.

LEMUEL P. MATHEWS and J. S. WHEELER,
Assistant United States Attorneys, Phoenix, Ariz.

J. P. GROSS, Regional Attorney, United States Vet-
erns' Bureau, Phoenix, Arizona.

Attorneys for Appellant.

W. E. PATTERSON, Attorney-at-Law, Prescott,
Arizona.

Attorney for Appellee. [2].

In the United States District Court, in and for the
District of Arizona.

At Law—301—Prescott

CLAUDE CARTER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FIRST AMENDED COMPLAINT.

Comes now the plaintiff above named, and for
cause of action against the defendant herein, com-
plains and alleges as follows:

I.

That plaintiff, Claude Carter, is a citizen of the United States of America and a resident of Yavapai County, State of Arizona.

II.

That on or about the 22nd day of April, A. D. 1917, plaintiff enlisted in the army of the defendant, United States of America.

III.

That thereafter, on or about the 1st day of February, 1918, upon application of plaintiff, said plaintiff then and there being in the military service of the United States, there was issued to said plaintiff by the defendant a policy of War Risk Term Insurance whereby and in consideration of the premiums paid and to be paid by the plaintiff, said defendant obligated itself to pay the said plaintiff, among other things, in the event of the permanent and total disability of the said plaintiff, the sum of Five Thousand Dollars (\$5,000.00), in monthly installments of \$28.75 each, commencing at the date of total and permanent disability of the plaintiff aforesaid. [3]

IV.

That on the date plaintiff enlisted in defendant's army as aforesaid, he was in good health, strong and vigorous and all of plaintiff's internal organs, particularly his lungs, were in a healthy, normal condition. That while plaintiff was in defendant's army as aforesaid, while in the line of duty, and prior to his

discharge from defendant's army as hereinafter alleged, he developed various ailments and diseases, namely: Pneumonia, pleurisy and or pulmonary tuberculosis.

V.

That plaintiff was honorably discharged from the military service of the United States on or about the 21st day of February, A. D. 1929.

VI.

That plaintiff was on or about the 29th day of February, 1920, at all times since has been and now is, sick, sore and weak in body; that the character and nature of the disease and or diseases with which plaintiff was afflicted on or about said date as aforesaid, was, ever since has been and now is, and or are such as to render it impossible for plaintiff to continuously follow any substantially gainful occupation, and was, ever since has been and now is, and or are founded upon conditions which render it reasonably certain that such disease or diseases will continue throughout the life of the plaintiff, and plaintiff alleges that said impairment of his body existed at the time of, has ever since said date as aforesaid continued, and now exists and will continue to exist as long as plaintiff lives, and that it has been and will be impossible for plaintiff to follow continuously any substantially gainful occupation as long as lives. That at the time plaintiff became totally and permanently disabled on the date as aforesaid, his said War Risk Insurance policy was in full force and effect. [4]

VII.

That plaintiff was on or about the 28th day of February, 1920, totally and permanently disabled.

VIII.

That plaintiff made application to the Director of the United States Veterans' Bureau for insurance benefits under said contract of insurance, as of from the date plaintiff became totally and permanently disabled as aforesaid, and for a rating of total and permanent disability. That said application was by the Director of the United States Veterans Bureau denied, and a disagreement has arisen between the said Director of the United States Veterans Bureau and plaintiff herein as to plaintiff's claim under said contract of War Risk Term Insurance, and the United States Veterans Bureau and the Director thereof have heretofore refused and do now continue to refuse to pay the same or any part thereof, as evidenced by virtue of a certain letter addressed to plaintiff herein, dated March 20, 1928, and signed by William Wolff Smith, General Counsel of the United States Veterans Bureau.

IX.

Plaintiff further alleges that he has performed all acts, things and conditions on his part required to be performed under said contract of insurance.

X.

That there is now due and payable to the plaintiff under said contract of War Risk Term Insurance for

installments now past due, the sum of Three Thousand Two Hundred Twenty Dollars (\$3,220.00), and the balance due on said contract of insurance, payable at the rate of Twenty-eight and 75/100 Dollars (\$28.75) per month.

XI.

That it is by the World War Veterans Act, 1924, as amended by An Act to Amend the World War Veterans Act, 1924, approved [5] March 4, 1925, in Section 500 thereof, provided that wherever a judgment or decree shall be rendered in an action brought pursuant to Section 19 of Title I of said Act, the Court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party, not to exceed ten per centum of the amount recovered, and to be paid by the Bureau out of the payments to be made under the judgment or decree; and plaintiff alleges that ten per centum of any amount recovered herein is a reasonable attorney's fee to be allowed herein, and that it has been necessary for plaintiff to employ attorneys to prosecute this action.

WHEREFORE, plaintiff prays that he have and recover judgment against the defendant as follows:

1. That defendant be ordered and directed to pay to plaintiff the sum of Three Thousand Two Hundred Twenty Dollars (\$3,220.00), and the balance due on said contract of insurance, payable at the rate of Twenty-eight and 75/100 Dollars (\$28.75) per month.

2. That defendant be ordered and directed to pay

to plaintiff's attorneys, W. E. Patterson and Norris, Flynn & Patterson, reasonable attorney's fees herein.

3. That the defendant be ordered and directed to pay plaintiff herein the sum of Twenty-eight and 75/100 Dollars (\$28.75) and to plaintiff's attorneys the sum of Two and 88/100 Dollars (\$2.88) on the first day of each and every month hereafter, until the balance due on said contract of insurance is paid in full.

4. That defendant be ordered and directed to pay interest at the rate of six per cent per annum on all moneys due plaintiff and his attorneys as above set forth.

5. For such other and further relief as to the Court may seem proper and just in the premises.

NORRIS, FLYNN & PATTERSON,
Attorneys for Plaintiff. [6]

State of Arizona,
County of Yavapai—ss.

Claude Carter, being first duly sworn by me upon his oath according to law, deposes and says: That he is the plaintiff named in the above entitled cause, and as such makes this affidavit; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters alleged on information and belief, and as to such he believes them to be true.

CLAUDE CARTER.

II.

Defendants admit the allegations in paragraph II of said complaint having to do with enlistment in the United States military service and the application for insurance, but allege in this connection that the date of enlistment was April 22, 1917, instead of April 17, 1917. Defendants further allege that the date of application for insurance by the plaintiff was February 1, 1918, and not December 20, 1917. Defendants further allege that the plaintiff allowed his insurance to lapse for non-payment of premium due April 1, 1920, and the term insurance, as such, was not thereafter in force and effect. Each and every other allegation in paragraph II of said complaint is denied generally and specifically as though the same were herein set out.

III.

Defendants deny each and every allegation in paragraph III of plaintiff's complaint, as though said allegations were here specifically repeated. [8]

IV.

Defendants admit the allegations in paragraph IV of plaintiff's complaint that the plaintiff was honorably discharged from the United States military service.

V.

Defendants deny generally and specifically each and every allegation in paragraph five of plaintiff's complaint contained as though said allegations were here specifically repeated and allege in this connection that the plaintiff allowed his insurance to lapse

for non-payment of premium due April 1, 1920, and said insurance was thereafter not in force and effect. In such failure on the part of the plaintiff to pay premium when due, said plaintiff has wholly failed to perform the covenants of agreement and that said insurance was not in full force and effect.

VI.

Defendants admit that a disagreement exists between the plaintiff and the United States Veterans' Bureau as alleged in paragraph VI of said complaint but deny each and every other allegation therein contained as though here specifically repeated.

VII.

Defendants, having no information or belief as to the allegations contained in paragraph VII, deny the allegations in paragraph VII.

VIII.

Further answering plaintiff's complaint and by way of offset thereto in the event of any judgment obtained by the plaintiff in the above entitled action, defendants aver that they have heretofore awarded and paid to the plaintiff the sum of Two Hundred Seventy One and 60/100ths (\$271.60) Dollars, being twenty installments of Thirteen and 58/100ths (\$13.58) Dollars under and by virtue of an erroneous and illegal award of insurance by reason of the provisions of Section 305 of the World War Veterans' Act, 1924, and the defendants are entitled to have the said amount set off against any recovery by plaintiff herein. [9]

WHEREFORE, defendants pray that plaintiff take nothing by this suit and that defendants have judgment and costs herein incurred.

JOHN C. GUNG'L,
United States Attorney.

By LEMUEL P. MATHEWS,
Asst. United States Attorney.

Service of copy of second amended answer acknowledged this 26th day of July, A. D. 1929.

W. E. PATTERSON,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, for the District of Arizona, Jul. 26, 1929.

C. R. McFALL,
Clerk.

By Thos. O. Bishop,
Deputy Clerk. [10]

In the District Court of the United States in and for
the District of Arizona.

MINUTE ENTRIES

March, 1929 Term. At Prescott.

SATURDAY, JUNE 1, 1929.

Honorable F. C. Jacobs, United States District Judge,
Presiding.

L-301

CLAUDE CARTER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

SUBSTITUTION OF COUNSEL.

John L. Sullivan, Esq., is present as counsel for the plaintiff. Thereupon, upon motion, of the plaintiff

IT IS ORDERED that said counsel be and he hereby is granted leave to withdraw and

IT IS FURTHER ORDERED that W. E. Patterson, Esq., be substituted as counsel for the plaintiff herein.

MONDAY, JULY 29, 1929.

TRIAL SETTING.

W. E. Patterson, Esquire, appears for the plaintiff, and L. P. Mathews, Esquire, Assistant United States Attorney, appears for the Government.

IT IS ORDERED that this case be and it is hereby set for Trial on August 20, 1929, at 10:00 o'clock, A. M.

MONDAY, AUGUST 5, 1929.

ORDER CONTINUING AND RESETTING
TRIAL.

F. E. Flynn, Esquire, is present for the plaintiff, and L. P. Mathews, Esquire, appears for the Government.

Upon stipulation of counsel IT IS ORDERED that the plaintiff be and he is hereby allowed to file an Amended Complaint herein. [11]

IT IS FURTHER ORDERED that the order heretofore made and entered herein setting this case

for trial on August 20, 1929, be and it is hereby vacated and that this case be and it is hereby continued to be reset for trial.

SATURDAY, AUGUST 10, 1929.

ORDER SETTING FOR TRIAL.

F. E. Flynn, Esq., appears as counsel for the plaintiff. Lemuel P. Mathews, Assistant United States Attorney, appears for the Government. Whereupon, on stipulation of counsel,

IT IS ORDERED that this cause be and it is hereby set for trial on August 20th, 1929, at the hour of ten o'clock A. M.

MONDAY, AUGUST 19, 1929.

F. E. Flynn, Esq., appears as counsel for the plaintiff. Lemuel P. Mathews, Assistant United States Attorney, appears for the Government.

On motion of F. E. Flynn, Esq., counsel for the plaintiff,

IT IS ORDERED that depositions of W. E. LeMaster and W. W. Carter be and they are hereby published.

TUESDAY, AUGUST 20, 1929.

TRIAL.

This case comes on regularly for trial this day. F. E. Flynn, Esq., and W. E. Patterson, Esq., appear as counsel for the plaintiff, plaintiff being present in person. Lemuel P. Mathews, Assistant United States Attorney, appears for the Government.

On motion of Lemuel P. Mathews, Assistant United States Attorney,

IT IS ORDERED that L. A. Lawler, Trial Attorney, United States Veterans Bureau, and J. P. Gross, Regional Attorney, United States Veterans Bureau, be, and they are hereby entered as counsel for the defendant.

Plaintiff announces ready for trial and thereupon the Government moves for continuance and for an order vacating the trial of this case. [12] Whereupon, said motion is now argued by respective counsel, and

IT IS ORDERED that said motion be and it is hereby denied. Thereupon the Government announces ready for trial.

D. A. Little is sworn to report the evidence in this case.

A lawful Jury of twelve men is now duly empaneled and sworn to try this case.

IT IS ORDERED that all Jurors not empaneled in the trial of this case be and they are hereby excused to Wednesday, August 21st, 1929, at the hour of ten o'clock A. M.

W. E. Patterson, Esq., now reads aloud Plaintiff's First Amended Complaint, and Lemuel P. Mathews, Assistant United States Attorney, reads aloud the Government's Second Amended Answer to the Jury.

PLAINTIFF'S CASE.

The plaintiff, Claude Carter, is now sworn and examined in his own behalf.

And, thereupon, at 12 o'clock noon, the further trial of this case is ORDERED continued to the hour

of one-thirty o'clock P. M. this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel, are excused.

The Jury, and all members thereof, and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

PLAINTIFF'S CASE CONTINUED.

The plaintiff, Claude Carter, is now recalled and further examined in his own behalf.

The following Exhibits are admitted in evidence and filed on behalf of the Government:

Exhibit "A", Form 90, Federal Board for Vocational Education,

Exhibit "B", Letter February 27, 1920, signed Claude Carter,

Exhibit "C", Letter March 29, 1920, signed Claude Carter,

Exhibit "D", Letter May 28, 1920, signed Claude Carter,

Exhibit "E", Letter May 1, 1920, signed Claude Carter, [13]

Exhibit "F", Letter June 14, 1920, signed Claude Carter,

Exhibit "G", Letter July 2, 1920, signed Claude Carter,

Exhibit "H", Letter July 29, 1920, signed Claude Carter,

Exhibit "I", Letter September 2, 1920, signed Claude Carter,

Exhibit "J", Letter September 30, 1920, signed Claude Carter,

Exhibit "K", Letter October 30, 1920, signed
Claude Carter,

Exhibit "L", Letter November 29, 1920, signed
Claude Carter,

Exhibit "M", Letter December 28, 1920, signed
Claude Carter,

Exhibit "N", Letter February 1, 1921, signed
Claude Carter,

Exhibit "O", Letter March 18, 1919, signed Claude
Carter,

Exhibit "P", Letter January 7, 1926, signed Claude
Carter,

Exhibit "Q", Letter January 28, 1920, signed
Claude Carter.

On motion of J. P. Gross, Regional Attorney,
United States Veterans Bureau,

IT IS ORDERED that deposition of F. F. Mc-
Gruder be and it is hereby published.

Whereupon, the depositions of Wm. W. Carter
and Fred C. Carter are now admitted on behalf of
the Plaintiff and read in evidence and marked plain-
tiff's Exhibit Nos. One and Two respectively.

The following witnesses are sworn and examined
on behalf of the plaintiff:

J. F. Moreno,
Samuel W. Ensminger,
Eugene A. Gatterdam.

Exhibit "R", certified photostat of service and
clinical records of Adjutant General's Office, is now
admitted in evidence and filed on behalf of the Gov-
ernment.

And thereupon, the further trial of this case is
ORDERED continued to Wednesday, August 21st,

1929, at the hour of nine-thirty o'clock A. M., to which time the Jury, being first duly admonished by the Court, the parties and counsel, are excused. [14]

WEDNESDAY, AUGUST 21, 1929.

FURTHER PROCEEDINGS OF TRIAL.

The Jury, and all members thereof, and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The plaintiff rests.

Whereupon, the Government moves for a directed verdict in its favor, on the ground of insufficiency of evidence introduced by the plaintiff to establish a prima facie case, and

IT IS ORDERED that said motion for directed verdict be, and it is hereby denied, to which ruling of the Court the Government excepts.

GOVERNMENT'S CASE.

Exhibit "S", Deposition of W. E. LeMaster, is now admitted in evidence, filed and read *into* evidence on behalf of the Government.

Government's Exhibits "T", "U", "V", and "W", and "X," are now admitted, said Exhibits being reports of physical examinations made by Dr. A. C. Shamblin and dated September 18, 1919; March 24, 1920; April 26, 1920; December 8, 1921, and May 4, 1922, respectively, which are now read in evidence.

IT IS ORDERED that all Jurors not empaneled in the trial of this case be and they are hereby excused to the hour of two o'clock P. M. this date.

The following witnesses are sworn and examined on behalf of the Government:

J. H. Malory,

G. D. Allee.

And the Government rests.

Plaintiff rests.

Both sides rest.

Whereupon, the Government now renews its motion for a directed verdict, and [15]

IT IS ORDERED that said motion be and it is hereby denied, to which ruling the Government excepts.

Whereupon, the plaintiff moves for a directed verdict for plaintiff and

IT IS ORDERED that said motion be and it is hereby denied.

All the evidence being in the case is argued by respective counsel to the Jury. And thereupon the further trial of this case is ORDERED continued to the hour of one thirty o'clock P. M. this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

The Jury, and all members thereof and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Further argument is had by respective counsel to the Jury. Whereupon the Court duly instructs the Jury, and said Jury retire in charge of their bailiffs, officers of this Court first duly sworn for that purpose, to consider of their verdict.

On motion of J. P. Gross, Regional Attorney, U. S. Veterans Bureau,

IT IS ORDERED that all exhibits, both plaintiff's and Government's, admitted in evidence, be withdrawn for the purpose of making photostat copies thereof and that said photostat copies be substituted for said original exhibits after being duly verified.

Subsequently, at the hour of three forty o'clock P. M., all counsel being present, the Jury return into open Court in a body and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict:

[Title of Court and Cause.]

"We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of the Plaintiff, Claude Carter, [16] as prayed for in the Plaintiff's Complaint.

A. M. Crawford, Foreman."

The Verdict is read as recorded, and no poll being desired by either side, the Jury is discharged from the further consideration of this case, and excused to the hour of two o'clock P. M. Thursday, August 22nd, 1929.

[Title of Court and Cause.]

The above entitled cause came on regularly for trial in the above entitled court, before a jury, on the 20th day of August, 1929. The plaintiff appeared in person and by his counsel, Norris, Flynn & Patterson,

and the defendant being represented by its attorney, Lemuel P. Mathews, Deputy United States District Attorney, and L. A. Lawler and J. P. Gross, and all parties announcing ready for trial, the cause proceeded to trial.

The jury was regularly empaneled and sworn to decide the issues submitted to it by the Court and to render its verdict thereon. Thereupon, evidence both oral and documentary was introduced by and on behalf of the parties, and the trial proceeded until its conclusion on the 21st day of August, 1929. Upon the conclusion of the evidence, argument of counsel and instructions of the Court, the jury retired to consider its verdict, based upon the issues raised. Thereafter, on the 21st day of August, 1929, the jury returned its verdict into Court, which verdict is in words and figures as follows:

“We, the Jury duly empaneled and sworn in the above entitled action, upon our oaths do find for the plaintiff as prayed for in the complaint.”

And thereupon judgment was entered in behalf of the plaintiff in accordance with the verdict.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment be and the same hereby is entered in favor of the plaintiff, Claude Carter, and against the defendant, the United States of America, in the sum [17] of Two Thousand Nine Hundred Thirty-eight and 40/100 Dollars (\$2938.40).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant shall deduct from the amount of said judgment the sum of Two Hundred Ninety-three and 80/100 Dollars (\$293.80),

being ten per cent thereof, and pay the same to plaintiff's attorneys, Norris, Flynn & Patterson, as attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, United States of America, through the United States Veterans Bureau, shall pay to the plaintiff's attorneys, Norris, Flynn & Patterson, ten per cent of all future installments paid to the plaintiff, Claude Carter, by the defendant by virtue of this judgment having been entered, said payments to be as attorney's fees for services rendered herein.

Dated this 21st day of August, 1929.

F. C. JACOBS, Judge.

O. K. as to form
Lemuel P. Mathews
Asst. U. S. Atty.

FRIDAY, AUGUST 23, 1929.

On motion of J. P. Gross, Esquire, Regional Attorney, United States Veterans Bureau, IT IS ORDERED that the defendant herein be, and is hereby allowed seventy days from and after August 21, 1929, within which to prepare, serve and file Bill of Exceptions.

September, 1929 Term.

At Prescott.

MONDAY, SEPTEMBER 16, 1929.

Honorable Jeremiah Neterer, United States District Judge, specially assigned, presiding.

ORDER CONTINUING MOTION FOR NEW TRIAL.

Defendant's motion for new trial herein comes on regularly for hearing this date. No counsel appears for Plaintiff. J. S. Wheeler, Assistant United States Attorney, appears for the Government. Whereupon,

IT IS ORDERED that defendant's motion for new trial be and it is hereby continued to November 4th, 1929, at ten o'clock A. M. [18]

MONDAY, OCTOBER 21, 1929.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

On motion of J. P. Gross, Esq., Regional Attorney, United States Veterans Bureau,

IT IS ORDERED that time of the Government within which to prepare, serve and file its Bill of Exceptions herein be and it is hereby extended to November 4, 1929.

SATURDAY, NOVEMBER 2, 1929.

Honorable F. C. Jacobs, United States District Judge, presiding.

ORDER DENY MOTION FOR NEW TRIAL.

Defendant's motion for new trial comes on regularly for hearing this date. F. E. Flynn, Esq., appears as counsel for the plaintiff, and L. P. Mathews, Esq., Assistant United States Attorney, appears for

the Government. Whereupon, said motion is now duly argued by counsel, and

IT IS ORDERED that said defendant's motion for new trial be and it is hereby denied. [19]

[Title of Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that the defendants in the above entitled cause appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, from the judgment entered in said cause and from a certain order entered herein denying the defendants' motion for a new trial.

JOHN C. GUNG'L,
United States Attorney.

By J. S. WHEELER,
Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court for the District of Arizona, Dec. 18, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [20]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL
TO THE CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

To the Honorable Judge of said Court:

Comes now the defendants in the above entitled cause, the United States of America, and through their United States Attorney respectfully moves this Court for an order allowing an appeal to the Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, upon a certain judgment entered heretofore in this cause and from a certain order denying a motion for a new trial, filed herein by the defendants, and for an order for a transcript of the record, proceedings and papers upon which said judgment was made and upon which the said order denying motion for a new trial was entered, all duly authenticated, to be transmitted by the Clerk of the United States District Court, in and for the District of Arizona, to the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

JOHN C. GUNG'L,
United States Attorney.
By J. S. WHEELER,
Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court for the District of Arizona, Dec. 18, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [21]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendants in the trial Court in the above entitled cause, through the United States Attorney and files this the following assignment of errors upon which it will rely in prosecution of the appeal of the above entitled cause, from a certain judgment, decree and orders heretofore made and entered by the Honorable Fred C. Jacobs, Judge, United States District Court in and for the District of Arizona.

I.

The Court erred in entering its order compelling the defendant to submit certain files, papers, and documents in defendant's possession to the inspection of the plaintiff's counsel.

II.

The Court erred in entering its order denying the motion of the defendant for a directed verdict at the close of the testimony on the insufficiency of the evidence to constitute a prima facia case.

III.

The Court erred in entering its order denying the motion of the defendant for a directed verdict on the ground that the uncontradicted testimony of the plaintiff affirmatively showed that he could and did work for the city of Rome, Georgia, as a truck driver for a considerable time at a substantially gainful occupation and was not and could not have been permanently and totally disabled over the same period. [22]

IV.

The Court erred in entering judgment.

V.

The Court erred in entering its order denying the motion of the defendant for a new trial.

VI.

The Court erred in entering judgment on future installments of attorneys' fees.

WHEREFORE appellants pray that said judgment be reversed and the said United States Circuit Court of Appeals in and for the Ninth Circuit enter an order directing the United States District Court in and for the District of Arizona to enter a decree not inconsistent with the judgment of the Appellate Court.

JOHN C. GUNG'L,
United States Attorney.

By J. S. WHEELER,
Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court for the District of Arizona, Dec. 18, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [23]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

WHEREAS the petition of the defendants in the above entitled cause has been filed and presented to this Court wherein it is prayed that an appeal be allowed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment entered herein, orders and rulings in said cause, and it appearing to the Court that notice of such appeal has been given, that such appeal should be allowed,

WHEREFORE IT IS ORDERED that an appeal to the Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, from the said judgment and from a certain order heretofore entered denying a motion for a new trial, is hereby allowed;

IT IS FURTHER ORDERED THAT the transcript of the record, papers, orders and proceedings be transmitted, duly certified, to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

Dated this 18th day of December, 1929.

F. C. JACOBS,
Judge, United States District Court,
in and for the District of Arizona.

[Endorsed]: Filed in the United States District Court for the District of Arizona, Dec. 18, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [24]

[Title of Court and Cause.]

PRAECIPE.

The defendant in the above entitled cause having sued out an appeal now respectfully request that you, the Clerk of the aforesaid Court, include in the records to be transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, San Francisco, California, together with this request and other papers connected therewith, the following papers, pleadings and documents, to-wit:

1. The plaintiff's first amended complaint.
2. The plaintiff's supplemental complaint.
3. The defendant's second amended answer.
4. The verdict of the jury.
5. The judgment.
6. The order of the Court requiring the defendant to submit certain files, papers and documents in the defendant's possession to the inspection of the plaintiff's counsel.
7. All minute entries.
8. This request.
9. All orders of the Court and in particular an order of the Court denying defendant's motion for a directed verdict and order overruling the defendant's motion for a new trial.
10. Transcript of the record.
11. Clerk's certificate. [25]
12. Proof of service of citation.
13. The notice of this appeal.
14. The order allowing this appeal.

Dated this the 18th day of December, A. D. 1929.

JOHN C. GUNG'L,
United States Attorney.

By J. S. WHEELER,
Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court for the District of Arizona, Dec. 18, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [26]

[Title of Court and Cause.]

AMENDED PRAECIPE.

The defendant in the above entitled cause having sued out an appeal now respectfully request that you, the Clerk of the aforesaid Court, include in the records to be transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, San Francisco, California, together with this request and other papers connected therewith, the following papers, pleadings and documents, to-wit:

1. The plaintiff's first amended complaint.
2. The plaintiff's supplemental complaint.
3. The defendant's second amended answer.
4. The verdict of the jury.
5. The judgment.
6. The order of the Court requiring the defendant to submit certain files, papers, and documents in the

defendant's possession to the inspection of the plaintiff's counsel.

7. All minute entries.

8. This request.

9. All orders of the Court and in particular an order of the Court denying defendant's motion for a directed verdict and order overruling the defendant's motion for a new trial.

10. Transcript of the record.

11. Clerk's certificate.

12. Proof of service of Citation.

13. The notice of this appeal.

14. The order allowing this appeal. [27]

15. Petition for appeal.

16. Assignments of Error.

Dated this the 18th day of December, A. D. 1929.

JOHN C. GUNG'L,
United States Attorney.

By J. S. WHEELER,
Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court for the District of Arizona, Dec. 18, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [28]

[Title of Court and Cause.]

PROOF OF SERVICE.

State and District of Arizona,
County of Maricopa—ss.

J. P. Gross, being first duly sworn, deposes and says: That heretofore and on the date of the filing thereof with the Clerk of this Court, affiant enclosed in an envelope, duly stamped, sealed, addressed and mailed to Messrs. Flynn and Patterson, attorneys for the plaintiff, who reside at, and whose postoffice address is Prescott, Arizona, which envelope contained the following papers: Copy of assignments of error issued herein, a copy of citation issued herein, a copy of notice of appeal issued herein and a copy of the praecipe; that the affiant is Regional Attorney of the United States Veterans' Bureau, appearing for the defendant above named in the above-entitled court; that affiant's residence is Phoenix, Arizona, and that Prescott, Arizona, and Phoenix, Arizona, there is now, and has been at all times herein mentioned, regular mail delivery between the two points.

J. P. GROSS.

Subscribed and sworn to before me this the 19th day of December, A. D. 1929.

[Seal]

H. F. SCHLITTLER,
Deputy Clerk, District Court of the United
States, for the District of Arizona. [29]

[Endorsed]: Filed in the United States District Court for the District of Arizona Dec. 19, 1929.

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [30]

In the District Court of the United States, in and for
the District of Arizona.

United States of America,
District of Arizona—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Claude Carter, Plaintiff, vs. United States of America, Defendant, numbered L-301-Prescott, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 33, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that no fees have been charged by me as constructive earnings against the United States for the preparation of this record.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said Court this 31st day of December, A. D. 1929.

[Seal]

C. R. McFALL,
Clerk.

By J. Lee Baker,
Chief Deputy Clerk. [31]

[Title of Court and Cause.]

CITATION ON APPEAL.

*To Messrs. Flynn and Patterson, Attorneys, Prescott,
Arizona,*

Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals in and for the Ninth Circuit, Federal Building, San Francisco, California, within thirty days from date, pursuant to an order allowing an appeal, filed and entered in the office of the Clerk of the United States District Court in and for the District of Arizona, from a certain judgment and orders of the Court and from a denial of the motion for a new trial made by the defendants in a certain suit, styled Claude Carter vs. The United States of America, wherein the United States of America is appellant and Claude Carter appellee in the higher court, to show cause, if any there be, why the judgment rendered against the

appellants and orders heretofore entered should not be corrected and why justice should not be done to the parties in this behalf.

Done in open Court this the 18th day of December, A. D. 1929.

[Seal] FRED C. JACOBS,
Judge, United States District Court, in and
for the District of Arizona. [32]

[Endorsed]: Filed in the United States District Court, for the District of Arizona, Dec. 18, 1929

C. R. McFALL,
Clerk.

By H. F. Schlittler,
Deputy Clerk. [32]

[Endorsed]: No. 6037. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Claude Carter, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed January 2, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

